No. 73-1352

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT E. WALDEN, ET AL., PETITIONERS

v.

SMALL BUSINESS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the doctrine of sovereign immunity violates the Fifth, Ninth and Tenth Amendments of the Constitution, particularly as applied to actions based on alleged misrepresentations by government agencies.

In 1966, petitioners received a loan of $102,000 from the Small Business Administration (SBA) to buy certain real property, which loan they secured with deeds of trust for other properties. When petitioners failed to make the monthly payments on the loan, the SBA sold the security to satisfy the loan obligations (R. 41-44).[1]

[1] "R." references are to the Record on Appeal to the court of appeals.

Petitioners commenced this action in 1970 in a California state court seeking to recover $100,000 from the SBA and various individuals, on the ground of fraud.[2] Petitioners alleged that the SBA had represented that the property which they were buying was worth $100,000 when actually the SBA had appraised the property at only $49,000 (R. 4-6). After the action was removed to the district court on the government's motion (R. 1), that court dismissed the complaint as to the SBA as barred by the Federal Tort Claims Act (28 U.S.C. 2680(h)) and as to the individual defendants for lack of jurisdiction (Pet. App. iv-viii). The district court also rejected petitioners' argument that the doctrine of federal sovereign immunity was unconstitutional (Pet. App. vi-vii). The court of appeals affirmed (Pet. App. i-ii).

Although Congress has given the SBA the right to sue and be sued (15 U.S.C. 634(b)(1)), the exclusive remedy for a tort claim arising out of a federal employee's conduct is a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 2679(a).[3] *Edelman* v. *Federal Housing Administration*, 382 F. 2d 594, 596 (C.A. 2). Petitioners failed to sue the United States under the Federal Tort Claims Act (the applicable two-year statute of limitations (28 U.S.C.

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[2]Petitioners also alleged in their complaint several other causes of action based on contract, which they have abandoned.

[3]Section 2679(a) provides:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

2401(b)) has now run) and the district court was without jurisdiction over their suit against the SBA.

Had this action been brought under the Federal Tort Claims Act, it would have been barred under 28 U.S.C. 2680(h), which provides that the Act shall not apply to "[a]ny claim arising out of * * * misrepresentation, deceit, or interference with contract rights," because this action is based on the alleged misrepresentation by the SBA of the value of property. See *United States* v. *Neustadt*, 366 U.S. 696.

Petitioners argue solely that the United States cannot constitutionally withhold its consent to be sued in tort actions based on misrepresentation. Petitioners point to nothing, however, to show the unconstitutionality of this application of the settled principle of sovereign immunity. See, *e.g.*, *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 388; *Monaco* v. *Mississippi*, 292 U.S. 313, 321; *Williams* v. *United States*, 289 U.S. 553, 573-577. See also *Laird* v. *Nelms*, 406 U.S. 797. Whether and to what extent the doctrine should be further relaxed is for the Congress, not the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

[R11-1974-05]